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No. 1065

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

REVEREND PAUL SCHENCK and DWIGHT SAUNDERS,

Petitioners,

v.

PRO-CHOICE NETWORK OF WESTERN NEW YORK, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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Amicus Brief of Life Legal Defense Foundation In Support of Petitioners

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INTEREST OF AMICUS[1]

Amicus Life Legal Defense Foundation (LLDF) is a California non-profit corporation which provides legal assistance to pro-life advocates. LLDF was started in 1989, when massive arrests of pro-life advocates engaging in non-violent civil disobedience created the need for attorneys and attorney services to assist those facing criminal prosecution. Most of these prosecutions resulted in convictions for trespass or blocking, sentences consisting of fines, jail time or community service, and stern lectures from judges about the necessity of protesting within the boundaries of the law.

Beginning in approximately 1990, LLDF was called on to assist in a new type of defense. Individuals picketing, leafletting and counseling in parking lots open to the public were sued for trespass, although the California Constitution has been held to protect speech activity on commercial property open to the public. Most of these lawsuits ended in injunctions keeping pro-life individuals off private commercial property, with assurances that the adjacent public sidewalks provided an adequate alternative forum.[2]

By the following year, pro-life individuals across California were being sued to enjoin them from engaging in any speech activity in "speech-free" zones of varying sizes, all of them including substantial portions of the public sidewalk. To date, LLDF has defended and/or

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[1] Counsel of Record to the parties in this case have consented to the filing of this brief, and letters of consent have been filed with the Clerk of the Court pursuant to Rule 37.

[2] *See, e.g., Planned Parenthood of San Diego and Riverside Counties v. Wilson*, 234 C.A.3d 1662, 1674 (1991) ("here, the public sidewalk is located immediately in front of the Medical Center. . . . [Arriving patients] *can simply accept the protesters' literature by rolling down their car windows, [or] slow or stop on the street as they enter the driveway*. . . . Mindful that the right of free speech involves a guarantee of providing a forum so one may reach the minds of willing listeners, the protesters' exclusion from the parking lot has not deprived them of an ample opportunity within the traditional public forum of the public sidewalk to do so") (emphasis added). *See also, Allred v. Shawley*, 232 Cal. App. 3d 1489, 1503-04 (1991) (same).

continues to defend persons who have been preliminarily or permanently enjoined from public forum speech activity at fifteen abortion facilities in California. The speech-free zones range in size from fifteen feet to fifty yards, with most of them structured so as to prevent any personal contact with or leafletting of persons approaching the facilities.

In the wake of these injunctions, as well as recent ordinances restricting speech, LLDF finds itself once again providing legal defense in criminal cases, this time for conduct which up until very recently was not only legal but constitutionally protected. Now the pro-life defendants are being told that their free speech rights have not been infringed because they can still convey their message from across the street, or down the block, or to anyone who chooses to come to them. They are chided for "quibbling over a few feet" in resisting injunctions keeping them 60 feet away from their audience.[3]

LLDF and those associated with it fear that this Court's decision in *Madsen v. Women's Health Center*, 114 S.Ct. 2516 (1994), has created a flawed doctrinal framework for assessing the validity of these injunctive restrictions on speech. LLDF respectfully requests this Court to reconsider its holding in that case.

INTRODUCTION AND SUMMARY OF ARGUMENT

In February, 1994, this Court granted certiorari in *Madsen v. Women's Health Center*. The case was argued on April 28, 1994, and the decision handed down on June 30. 114 S.Ct. 2516 (1994).

At issue in *Madsen* were several provisions of an injunction imposed by a Florida trial court judge, provisions which restricted the speech activities of the defendants at an abortion clinic and at the homes of

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[3] *Planned Parenthood Shasta-Diablo, Inc. v. Williams*, 7 Cal. 4th 860, 873 P.2d 1224, 30 Cal. Rptr. 2d 629 (1994), vacated and remanded, 115 S.Ct.413 (1994), reaffirmed, 10 Cal.4th 1009, 898 P.2d 402, 43 Cal. Rptr.2d 88 (1995), *petition for cert. filed*, No. 95-0576 (October 6, 1995) (quoting *Portland Feminist Women's Health Center v. Advocates for Life*, 859 F.2d. 681, 686 (9th Cir. 1988).)

clinic employees. The Florida Supreme Court upheld the injunction, applying the "time, place, and manner" test for statutes and ordinances restricting speech in public fora. See *Perry Educ. Ass'n. v. Perry Local Ed. Ass'n.*, 460 U.S. 37, 45 (1983).

Shortly before the Florida Supreme Court decision was handed down, the Court of Appeals for the Eleventh Circuit, in a separate action, ruled the very same injunction was unconstitutional. The court, also applying *Perry*, concluded that the restrictions were content-based and did not satisfy the more stringent criteria for content-based ordinances. *Cheffer v. McGregor*, 6 F.3d 705, 711 (11th Cir. 1993), vacated on rehearing and remanded, 41 F.2d 1421, 1422 (1994) (en banc).

This Court granted certiorari to resolve the conflict between the Florida Supreme Court and the Court of Appeals. 114 S.Ct. at 2523. Unfortunately, in so doing, this Court built on the same fundamental doctrinal error which characterized both of the lower court decisions. Both of the lower court decisions, and consequently this Court's decision, assumed that the validity of the injunction should be tested by considering various governmental interests and balancing them against the particular restrictions. The Florida Court, using the "narrowly tailored to serve a significant governmental interest" test, upheld all the restrictions. The Eleventh Circuit, using the "narrowly drawn to serve a compelling state interest" test, struck down all the restrictions. This Court, using a "burdens no more speech than necessary to serve a significant government interest" test, upheld some restrictions and struck down others.

However, the critical issue in assessing the validity of these injunctive restrictions is not which test should be used for balancing, but what should be balanced. The two lower court decisions and *Madsen* all balanced the defendants' free speech rights against *government* interests. But the government was not a party to the litigation, and never asserted any interests. The injunction should have been tested only against the plaintiffs' private interests.

Had the injunction been limited to providing relief for the *plaintiffs'* interests, the entire issue of restricting defendants' speech in the public forum need never have arisen. By taking on the legislative function of

delineating and protecting governmental interests on public ways, the lower courts have created a legal morass into which the free speech and due process rights of countless individuals are disappearing from sight.

I. GOVERNMENTAL INTERESTS ARE NOT AT ISSUE IN LITIGATION BETWEEN PRIVATE PARTIES.

A. *The purpose of injunctive relief is to protect the rights of the plaintiff, not the government.*

In discussing the differences between generally applicable statutes and injunctions, this Court stated: "The parties seeking the injunction assert *a violation of their rights*; the court hearing the actions is charged with fashioning a remedy for *a specific deprivation*, not with the drafting of a statute addressed to the general public." *Madsen*, 114 S.Ct. at 2524 (emphasis added). The Court subsequently noted that, "quite apart from First Amendment considerations, '[] injunctive relief should be no more burdensome to the defendants than necessary to provide *complete relief to the plaintiffs*.' [citing *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979).]" 114 S.Ct. at 2525 (emphasis added).

However, the Court then immediately went on to delineate a test which asks "whether the challenged provisions of the injunction burden no more speech than necessary to serve a *significant governmental interest*." *Id.* (Emphasis added).

If the plaintiff were a governmental entity, as in *Carroll v. President and Comm'rs of Princess Anne*, 393 U.S. 175 (1968), this test could logically be applied. However, in the case of a private plaintiff, the abrupt substitution of governmental interests for private rights is contrary to the very principles of equity which the Court earlier enunciated.

Private parties seeking injunctive relief assert their own rights, not those of the government.[4] The duty of the trial court is to "fashion[]

[4] *See, e.g., Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc.*, 312 U.S. 287, 291 (1941) (plaintiffs "brought suit against the Union and its officials to stop interference with the distribution of its products"); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 891, 894 (1982) (reviewing judgment of damages and injunctive relief upheld on theory of liability for malicious interference with the plaintiffs' businesses).

a remedy for a *specific deprivation*" of the plaintiff's rights, 114 S.Ct. at 2523, not to address the general interests of society. There is no basis, in law or logic, for giving private parties standing to assert governmental interests, nor to grant them relief tailored to serve, not their own interests, but those of the state.

B. *Asserting governmental interests is not the function of courts.*

Just as it is inappropriate for private parties to assert governmental interests, so, too, courts exceed their jurisdiction when they invoke such interests on behalf of a private party in civil litigation. The function of the judiciary in civil litigation is simply to adjudicate the claims and defenses of the parties before it, be they public or private entities.

As Justice Scalia pointed out in his dissent in *Madsen*, " 'significant government interests' are general, innumerable, and omnipresent." 114 S.Ct. at 2542. These interests, in the diverse interactions between citizens, will often conflict with one another. It is the function of the legislative branch to select, balance, and set priorities among these interests, and to choose the appropriate means for effectuating its decisions.[5] When a governmental action is challenged, it is the function of the judiciary to apply various tests to determine whether the state's chosen means and ends constitute a legitimate exercise of authority, or run afoul of constitutional protections.

[5] For example, a state might weigh the conflicting interests in promoting parental authority and protecting the privacy rights of minors, in deciding whether to require parental consent for abortions. *See, e.g., Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502 (1990). A city might weigh the interest in preventing "visual blight" against that of encouraging political participation in deciding whether to ban the posting of signs. *See City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984). A town might balance the interest in protecting residential privacy against that of protecting free speech, in deciding whether to limit residential picketing. *See Frisby v. Schultz*, 487 U.S. 474 (1988).

In *Madsen*, *Pro-Choice Network*, and similar injunction cases, the lower courts have taken upon themselves the legislative function of deciding that some governmental interests need to be protected at the expense of others, e.g., free speech rights must yield to the free flow of traffic. In so doing, they are no longer acting as an impartial judiciary, balancing the interests asserted by the state against the constitutionally protected rights of the individual. Rather, the courts become both the state actors imposing the restriction, and the judges of the constitutionality of the restrictions.[6]

This Court has held that governmental bodies may regulate the fora which they "[hold] in trust for the use of the public," *Hague v. CIO*, 307 U.S 496, 516 (1939). While speech activities in such fora are indisputably constitutionally protected, states are permitted to regulate and even restrict some of these activities, to serve various public interests. *Perry Educ. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 45 (1983).

In contrast, nothing in this Court's First Amendment jurisprudence suggests that the use of such fora may be restricted for the benefit of particular private parties. This Court has never upheld restrictions on free speech rights in public fora imposed to protect a particular individual's interests.[7] *See, e.g.*, *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 420 (1971) (striking down as prior restraint injunction prohibiting distribution of leaflets; "[d]esignating the conduct as an invasion of privacy . . . is not sufficient to support an injunction against peaceful distribution of informational literature of the nature revealed by this record").

[6] It is hardly surprising, under these circumstances, that when a judge issues an injunction effectuating his ordering of governmental interests, the injunction is frequently applied like an ordinance, even a viewpoint-based ordinance. *See, e.g.*, *Williams v. Planned Parenthood Shasta-Diablo, Inc.*, *supra*, No. 95-576, Reply to Brief in Opposition, at 5-6 (challenged injunction has been held to bind "anyone doing what those named in the injunction were prohibited from doing"); *Madsen*, 114 S.Ct. at 2540 (Scalia, J. dissenting) (transcript of judge stating that "in concert with means in concert with those who had taken a certain position in respect to the clinic, adverse to the clinic"); Petition for Writ of Certiorari, *Alf v. Florida*, 105 S.Ct. ____ (1995) (No. 94-1951) (denial of certiorari) (nonparties held in contempt of *Madsen* injunction where evidence of "in concert" actions was common pro-life viewpoint). *See also Planned Parenthood v. Project Jericho*, 52 Ohio St.3d 56, 556 N.E.2d 157, 165 (1990) (enjoining class of persons consisting of "persons picketing [on specified public streets] who have been personally served with this order" but not requiring action in concert).

The instant case provides an excellent example of the pitfalls of intermingling governmental interests with private interests. Respondents herein originally brought one federal cause of action, under 42 U.S.C. § 1985(3), as well as six state law causes of action. In issuing the prelimimary injunction, the district court ruled that the respondents were likely to prevail on the federal claim as well as on a parallel state civil rights claim, and on their state trespass claim. *Pro-Choice Network v. Project Rescue*, 799 F. Supp. 1417, 1431-2 (W.D.N.Y. 1992). The court did not address the remainder of respondents' state law claims. 799 F. Supp. at 1432 n.11.

After this Court's decision in *Bray v. Alexandria Women's Health Clinic*, 113 S.Ct. 753 (1993), the lower court dismissed the federal cause of action, but exercised pendent jurisdiction over the state law claims. *Pro-Choice Network v. Project Rescue*, 828 F. Supp. 1018 (W.D.N.Y. 1993). Since the state civil rights claim was predicated on the same alleged violation as the federal claim, 799 F. Supp. at 1431, this state claim, too, no longer retains any validity after *Bray*. Thus, the only cause of action now underlying the intricate speech restrictions imposed by the district court is a state law trespass claim.

Though petitioners raised these arguments in their appeal to the Second Circuit, the Second Circuit panel declined to address them because petitioners had not raised them at the trial court. *Pro-Choice Network v. Schenck*, 67 F.3d 359, 367-8 (2d Cir. 1994). Rather than remanding for consideration of these crucial non-constitutional questions, the Second Circuit proceeded to determine the constitutional

[7] Again, this Court held the restrictions in *Madsen* to be justified by a combination of governmental interests. 114 S.Ct. at 2526.

question of whether the challenged restrictions were justified by significant *governmental* interests.[8]

If trial courts limited themselves to considering only the rights and interests asserted by party-plaintiffs (here, freedom from trespass), the relief granted would not encompass restrictions on protected speech in public fora. By tailoring relief to serve governmental interests, the courts not only infringe on free speech rights, but also wreak havoc on the basic structure of our civil litigation process. In effect, the government becomes a *sub silentio* plaintiff-intervenor, whose interests are selectively furthered by the private party plaintiff.[9]

C. *Adequate private causes of action exist to justify relief which protects access and prevents unlawful interference with patients.*

It is unclear from the lower court opinions in *Madsen* what specific causes of action the plaintiffs asserted.[10] However the Supreme Court of Florida did state that the plaintiffs seeking equitable relief had the burden of showing "that the threatened injury is real." *Operation Rescue v. Women's Health Center*, 626 So.2d 664, 670 (1993). Obviously, this "threatened injury" means an injury to the plaintiffs, not to the commonweal.

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[8] The Second Circuit panel also summarily disposed of petitioners' argument that respondent Pro-Choice Network, a private entity, lacked standing to assert governmental interests. The panel simply asserted, as if it were a self-evident proposition, "Having thus established its standing to maintain its claims against Project Rescue, Pro-Choice was entitled to argue that injunctive relief was a proper remedy because certain governmental interests would be furthered by the issuance of such relief." 67 F.3d at 367. Thus, according to the Second Circuit, as long as a private plaintiff has any valid claim against a defendant, it may also seek whatever injunctive relief may arguably further some *governmental* interest.

[9] Thus, these cases might more honestly be captioned *State ex rel. Abortion Clinic v. Pro-Life Activist*.

[10] Ironically, the complaint was not included in the Joint Appendix filed in *Madsen*. In light of the Court's ruling, the complaint was irrelevant anyway, as the relief was purportedly tailored to serve governmental interests, rather than the plaintiffs' causes of action.

Several causes of action, including trespass, nuisance, and interference with business, could presumably be brought to address the injuries the *Madsen* plaintiffs allegedly suffered. They could rightfully assert their interests in protecting their private property, in protecting the use and enjoyment of that property by themselves and their clients, and protecting their business from unlawful interference.

An injunction which was "no broader than necessary to achieve [these] desired goals," 114 S.Ct. at 2525, could forbid trespass and interference with access. It could also forbid threats and assaults against clinic workers and clients. Depending on the law of the jurisdiction, it might also forbid loud noise which unreasonably disturbs the peace of the plaintiffs and their invitees on their property.

All of these are reasonable restrictions, and ones which the defendants in *Madsen* did not challenge.[11] Only when the trial court expanded the injunction to serve governmental interests, rather than the plaintiffs' interests, did the relief violate the defendants' free speech rights.

D. Madsen*'s recitation of governmental interests provides no guidance as to the nexus between each asserted interest and the relief granted.*

Beyond the doctrinal difficulties created by allowing private litigants to assert governmental interests, it is far from clear how this Court's recitation of the governmental interests at stake should be understood. After listing several interests which the Florida Supreme Court concluded were protected by the injunction, this Court stated: "We agree that the combination of these governmental interests is quite sufficient to justify an appropriately tailored injunction to protect them." 114 S.Ct. at 2526.

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[11] The noise restriction in *Madsen*, which defendants challenged, prohibited making any sounds "within earshot" of the patients inside the clinic. This is a far broader restriction than would be allowed in an ordinary nuisance claim, or, for that matter, in a generally applicable noise ordinance. *See also infra*, Section I(D).

Presumably this does not mean that each of the cited interests must be present to justify injunctive relief similar to that upheld in *Madsen*. If this were so, the decision would effectively single out abortion facilities for special treatment, because that context is, for all practical purposes, the only one in which the "interest in protecting a woman's freedom to seek lawful medical or counseling services in connection with her pregnancy" will be found. 114 S.Ct. at 2526.[12]

Nor could the Court mean that any one of the interests can justify any of the various restrictions upheld. For example, the interest in protecting "medical privacy" alone cannot justify restrictions on speech where both the speaker and the audience are in a public forum. ***But see Williams v. Planned Parenthood Shasta-Diablo, Inc.***, U.S. No. 95-576 (pending), Pet. App. at 16a. But does the allusion to the captive audience doctrine mean that women *inside* the clinics are captive, or are women approaching and leaving the clinic also deemed "captives"? Though some courts, including the Second Circuit in the instant case, have interpreted *Madsen* as designating women approaching clinics to be a "captive audience,"[13] this interpretation would mark a massive expansion of the captive audience doctrine.

Another example of *Madsen*'s ambiguity can be found in the Court's discussion of the provision banning "images observable" to those in-

[12] On the other hand, this interest never appears, in so many words, in the Court's discussion of the contested provisions of the injunction. Was the Court referring to this interest whenever it referred to "protecting access to the clinic"? If so, this means that it was not just access to private property, but access to an abortion clinic which necessitated these restrictions on speech, suggesting that *Madsen* applies primarily in the context of abortion protests. If not, this interest appears to be just a makeweight.

[13] *Pro-Choice Network v. Schenck*, 67 F.3d 377, 392 (2d Cir. 1995) (en banc). *See also*, *Sabelko v. City of Phoenix*, 68 F.3d. 1169, 1172 (9th Cir. 1995), petition for certiorari filed, No. 95-1415 (March 4, 1996) (Pet. App. at 8a). ***But see Pro-Choice Network***, 67 F.3d at 406 n.5 (Meskill, J. dissenting) ("The *Madsen* Court simply recognized that women *in* the clinic were 'held "captive" by medical circumstance,' . . . This however, does not mean that the women ***approaching*** the clinic are captive, and nothing in *Madsen* can be read as so holding") (original emphasis).

side the clinic. In striking down this provision, the Court said, "[I]f the blanket ban on all 'images observable' was intended to reduce the level of anxiety and hypertension suffered by the patients inside the clinic, it would still fail. The only plausible reason a patient would be bothered by 'images observable' inside the clinic would be if the patient found the expression contained in such images disagreeable." 114 S.Ct. at 2529.

This statement seems to mean that the provision violates the First Amendment because it is viewpoint-based. But one could similarly say, referring to the noise provision, that the only plausible reason a patient might be bothered by sounds from the petitioners which were merely audible but not disruptive would be if the patient found the expression contained in such sounds disagreeable. Cf. ***Grayned v. City of Rockford***, 408 U.S. 104, 119 (1972) (upholding noise ordinance prohibiting "only conduct which disrupts or is about to disrupt normal school activities").

The Court continued: "But it is much easier for the clinic to pull its curtains than for a patient to stop up her ears, and no more is required to avoid seeing placards through the windows of the clinic. This provision of the injunction violates the First Amendment."

Here the Court indicates that the restriction is simply overly burdensome in light of the clinic's ability to block out the speech by pulling the curtains. The Court's discussion leaves open the question of whether even ***viewpoint-based*** restrictions on speech are permissible in the interests of protecting a "captive audience," where no less burdensome method is available.

Unfortunately, although *Madsen* stressed the importance of achieving the correct "fit between the objective of the injunction and the restrictions it imposes on speech," 114 S.Ct. at 2525, the decision fails to identify the nexus between each of the asserted interests[14] and the relief granted.

[14] Indeed, the asserted interest in "ensuring the public safety and order," is not so much an interest as a definition of the basic duty of government. Achieving the proper "fit" between the breadth of this interest and a restriction on speech is a formidable task.

II. THE LOSS OF FIRST AMENDMENT FREEDOMS SHOULD NOT BE IMPOSED AS PUNISHMENT FOR THEIR EXERCISE.

A. *The proper response to the violation of an injunction is a contempt proceeding, not another injunction.*

This Court in *Madsen* stated, "Injunctions . . . are remedies imposed for violations (or threatened violations) of a legislative or judicial decree." 114 S.Ct. at 2524. In the particular instance, defendants were found to have violated the trial court's narrower order, which prohibited blocking and trespass. Thus, the imposition of a broader injunction restricting the defendants' free speech rights was held to be necessary to protect access. *Id.* at 2527.

However, the imposition of a broader injunction is certainly not the only, or even the most logical, remedy for violation of an injunction. Assuming *arguendo* that the defendants violated the injunction by interfering with access, the plaintiff's first recourse should have been to seek contempt citations. The narrower injunction cannot be said to have failed to protect access, when there is nothing in the record indicating the plaintiff made any effort to enforce that injunction.

Suppose the defendants violated the noise provision by continuing to make sounds "within earshot" of patients inside the clinic. Could the plaintiffs, rather than seeking to enforce the present injunction through contempt proceedings, instead ask for a further modification of the order to keep the defendants a block away from the clinic, or to forbid them from making any sound at all while in the vicinity of the clinic? The answer from *Madsen*, unfortunately, seems to be yes. The plaintiffs have no obligation to enforce the current order. The remedy for violations of the injunction is a broader injunction.

The absence of such efforts to hold the defendants accountable for allegedly violating the injunction inevitably creates the impression that the imposition of a broader, speech-restrictive injunction is itself the punishment for that offense. As noted *supra*, Section I, the concept of the injunction as remedial relief for the plaintiff was abandoned in fashioning the test for constitutionality. Apparently the plaintiff's

burden of proof has also disappeared. Rather than the plaintiff having to establish that the proposed injunctive restriction is necessary (as in "burdens no more speech than necessary"), the plaintiff need only show a violation of a law or another injunction.[15] At that point, the defendant's free speech rights are forfeit, regardless of what other steps the plaintiff might have taken to protect its interests.

B. *The protection of "unfettered" access leaves no room for lawful speech activity.*

Due to the lack of a complete record in *Madsen*, this Court based its decision to uphold the 36-foot zone "on the assumption that the evidence and testimony presented to the state court supported its finding that the presence of protesters standing, marching, and demonstrating near the clinic's entrance interfered with ingress to and egress from the clinic . . ." 114 S.Ct. at 2528.

This finding can be understood in two ways. First, it might be understood to mean that the defendants, because of the particular unlawful manner in which they were demonstrating in front of the clinic, were deliberately interfering with access. The corollary of this finding would be that the defendants had it within their ability to demonstrate and leaflet in front of the clinic *without* interfering with access. Accordingly, their continued refusal to do so provoked the trial court to modify the injunction to keep the defendants across the street.

Unfortunately, imprecise language in *Madsen* allows for a second, constitutionally sinister understanding of this finding, namely, a finding that in and of itself, the presence of demonstrators, regardless of their conduct, interfered with access and warranted broader injunctive relief. For example, the finding refers to the "presence of *protesters*," rather than specifically to the defendants or their agents. This suggests

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[15] The *en banc* court in the instant case denied that a plaintiff need even show that there has been a violation: "nothing in *Madsen* states, or even implies that a TRO must fail before a broader injunction may be imposed; . . ." 67 F.3d at 389. If this is true, then the mere assertion of governmental interests is sufficient to warrant injunctive relief against a defendant.

that the concern here is not with any wrongdoing of the defendants, but with the more general situation arising from the demonstrations.

Moreover, the Court earlier referred to the zone as a means of protecting "unfettered ingress to and egress from the clinic." 114 S.Ct. at 2527. The definition of "unfetter[ed]" is "free[d] from restraint of any kind." Websters' New Twentieth Century Dictionary, 2d Ed. (1966). Thus the Court indicated that injunctive restrictions on speech are appropriate to prevent even a slight impediment to access. Since even a single picketer passing back and forth, or a leafletter waiting to offer a leaflet, may cause cars to slow down, this Court's endorsement of "unfettered" access seems synonymous with holding that *any* demonstration activity in or near driveways threatens access and may be enjoined.[16]

Finally, this Court has held, in the context of statutory restrictions on speech, that '[a] complete ban can be narrowly tailored, but only if each activity within the proscription's scope is an appropriately targeted evil." *Frisby v. Schultz*, *supra*, 487 U.S. at 485. Under a "somewhat more stringent" standard, the Court upheld an injunction prohibiting the defendants from "congregating, picketing, patrolling, demonstrating or entering" the public sidewalk and street adjacent to the clinic. 114 S.Ct. at 2522, 2527. *A fortiori*, by upholding this "complete ban,"

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[16] In the instant case, the trial court imposed, and the *en banc* court upheld, restrictions on speech at every hospital, doctor's office or other facility in its jurisdiction at which abortions are performed. 799 F. Supp. at 1440. This suggests a reading of *Madsen* that does not require injunctions to be tailored to specific geographic conditions, but instead authorizes categorical injunctive bans on expressive activity. *But see Madsen*, 114 S.Ct. at 2527: "The state court seems to have had few other options to protect access, given the narrow confines around the clinic. . . . The need for a complete buffer zone near the clinic entrances may be debatable, but some deference must be given to the state court's familiarity with the facts and the background of the dispute. . . ."

If the one-size-fits-all injunction in the present case is upheld as "burden[ing] no more speech than necessary to serve significant governmental interests," defendants in other cases will be hard put to persuade courts that, in the particular circumstances of their case, these restrictions are overly burdensome.

Madsen implies that *any* speech activity in the vicinity of a driveway is "an appropriately targeted evil."

The goal of ensuring that no driver approaching the clinic need take his foot from the gas pedal places an unwarranted burden on free speech rights.

C. *Injunctive restrictions on speech infringe on the rights of innocent non-parties.*

Injunctive restrictions on speech raise a host of unanswered questions about the effect of the injunction on non-parties, specifically those who are not named but are bound by the injunction as "officers, agents, employees, and servants . . . and all persons acting in concert with" the enjoined parties.

This Court held that "the state court imposed restrictions on defendants incidental to their anti-abortion message because *they repeatedly violated the court's original order*." 114 S.Ct. at 2524 (emphasis added). What, then, is the justification for binding these non-parties, without individualized proof that they too violated the court's order? Do the terms "agent", "employee" and "acting in concert" refer to one's cooperation with the defendant in unlawful activity, or simply participating with the defendant in the speech activity underlying the injunction? Is freedom of speech an individual right, or does it subsist in groups of people "acting in concert," whence it can be taken away from all by showing that any member of the group acted unlawfully?[17]

If one of the petitioners in the instant cases were to ask someone new in town to demonstrate at the clinic, would that person be bound

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[17] Cf. *Healy v. James*, 408 U.S. 169, 185-6 (1972): "[T]he Court has consistently disapproved governmental actions imposing criminal sanctions or denying rights and privileges solely because of a citizen's association with an unpopular organization. . . . [I]t has been established that 'guilt by association alone, without [establishing] that an individual's association poses the threat feared by the government,' is an impermissible basis upon which to deny First Amendment rights. . . . The government has the burden of establishing a knowing affiliation with an organization possessing unlawful aims and goals, and a specific intent to further those illegal aims."

by the injunction? What justification is there for restricting the free speech rights of someone who never interfered with access, and never participated in the petitioners' unlawful activities? Why should either that person or the petitioner be held in contempt if the petitioner encourages the person to demonstrate in a non-obstructive manner on the public sidewalk within the buffer zone?

These questions expose once again the shaky underpinnings of *Madsen*. Where an injunction prohibits unlawful conduct, it is completely logical to bind persons in privity with parties, to prevent the parties from "nullify[ing] a decree by carrying out prohibited acts through aidors and abettors, although they were not parties to the original proceedings." *Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 14 (1945).

Where, however, the prohibited acts consist of otherwise constitutionally protected activity, there is no justification for prohibiting the parties from carrying out these acts through others. The petitioners should be free to say to someone, "I lost my right to be on the sidewalk by interfering with access. Will you please go take my place and demonstrate in a lawful manner?"

The fact that the petitioners are not free to encourage someone else to do those constitutionally protected acts that they are prohibited from doing supports the argument raised *supra*, section II(B), that the injunctive restrictions on speech rest, not on any alleged bad conduct of the petitioners, but on a judicial finding that *any* demonstration activity will interfere with "unfettered" access to the clinic, and may therefore be enjoined. The trial court, donning the mantle of the legislature, elevates the governmental interest in ensuring such access above the free speech rights of demonstrators. The resulting injunction is tacitly, or explicitly, understood by all—plaintiffs, defendants, law enforcement, other demonstrators, and the court itself—as a prohibition on speech activity applicable to all pro-life persons.

If *Madsen* continues to be the law of the land, this Court will be called on to decide these questions regarding the binding effect of speech-restrictive injunctions on non-parties. Until that time, however, these injunctions will continue to be used to violate and chill the legitimate exercise of free speech rights across the country.

CONCLUSION

The Court should take the opportunity presented by the instant case to reconsider its decision in *Madsen v. Women's Health Center*.

Respectfully submitted,

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